

USDOL/OALJ Reporter

[\*Smalls v. South Carolina Electric & Gas\*](#), ARB No. 01-078, ALJ No. 2000-ERA-27  
(ARB Feb. 27, 2004)

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**U.S. Department of Labor**

Administrative Review Board  
200 Constitution Avenue, N.W.  
Washington, D.C. 20210



**ARB CASE NO. 01-078**  
**ALJ CASE NO. 2000-ERA-0027**  
**DATE: February 27, 2004**

**In the Matter of:**

**ARDIS W. SMALLS,**  
**COMPLAINANT,**

**v.**

**SOUTH CAROLINA ELECTRIC & GAS,**  
**RESPONDENT.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

*For the Complainant:*

**Ardis W. Smalls, pro se, Moncks Corner, South Carolina**

*For the Respondent:*

**David R. Wylie, Esq., Haynsworth Baldwin Johnson & Greaves LLC, Greenville, South Carolina**

### **FINAL DECISION AND ORDER**

Ardis W. Smalls filed a complaint against South Carolina Electric & Gas (SCE&G) under the employee protection provisions of the Energy Reorganization Act (ERA or Act), 42 U.S.C.A. § 5851 (West 2003), and the implementing regulations at 29 C.F.R. Part 24 (2003).<sup>1</sup> He alleges that after he raised ERA-protected nuclear safety concerns, SCE&G retaliated by appraising his work performance as deficient. In his July 11, 2001 Recommended Decision and Order (R. D. & O.), the Administrative Law Judge (ALJ) concluded that management had rated Smalls "below expectations" for the year ending December 1, 1999, at least in part based on his ERA-protected activity. The ALJ thus determined that Smalls had prevailed on this complaint, and he recommended a remedy that included monetary and equitable relief. SCE&G appealed. We reverse.<sup>2</sup>

## FACTUAL BACKGROUND<sup>3</sup>

The background facts are essentially uncontroverted.<sup>4</sup> Smalls worked at V.C. Summer Nuclear Power Station (VCSNPS) from 1990 – 2000 as a computer specialist.<sup>5</sup> CX 2 at 40-41; CX 9, June 10, 1997 appeal letter at 2; HT 277 (Smalls). In 1993, Smalls was assigned responsibility for working as a Process Control Analyst with a multi-disciplinary team that was implementing modifications to a computerized fire protection system. HT 292-93 (Smalls); *see* HT 66-69 (Barton). That system is referred to as the SIMPLEX system, for the name of the manufacturer. HT 278-79 (Smalls). VCSNPS also has a non-computerized, manually operated, fire system. HT 280-81 (Smalls). The modification to the SIMPLEX system, which is referred to as Maintenance Request Form (MRF) 20951, was phased-in throughout the different buildings at the power station beginning in 1993. HT 347-49 (Browne). Over the years, the team had encountered various difficulties with system hardware and software that required the completion deadline to be delayed. *See, e.g.*, RX 3 at 3-4; CX 1, at 1995, 1996 and 1997 performance evaluations. Resolving problems that arose in the installation and testing of the system was a routine matter for the SIMPLEX team.

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Smalls held a bachelor's degree in computer science and, at the time of the hearing, was nine hours short of attaining a master's degree in computer resources. HT 276 (Smalls). Other than Smalls, who provided computer expertise and was actually an employee in the Plant Support Engineering division, the MRF 20951 team was composed primarily of supervisory staff from the Design Engineering division, along with a VCSNPS fire protection expert. HT 67-69 (Barton). Except for the knowledge he gained while on the SIMPLEX team, Smalls did not have experience or education in the fields of electrical, fire protection, or nuclear process engineering. HT 276, 282-83 (Smalls); *see* RX 17, tab 11, Evaluation Notes at 2, 4-7. He testified that he had been assigned to the MRF 20951 team "specifically to correct the problems with dealing with the computer issues on the SIMPLEX fire system." HT 292 (Smalls).

Melvin Browne, Smalls' second-level supervisor, said Smalls' responsibility on the team was "to handle the changes to the software as directed by [D]esign [E]ngineering, and to perform maintenance on the system." HT 343. Mike Kammer, the fire protection engineer who designed the overall lay-out of the system and who became a primary target of Smalls' concerns about the system, testified that the function of the Process Control Analyst was to play "primarily a supporting role on issues related to interfacing with the vendor software, and basically follow[ing] Design Engineering's lead in defining the tweaks that need to be made in the computer program to make the system work as Design Engineering wants it to function." HT 388-89. By 1995, Smalls had developed considerable expertise in the computerized function of the SIMPLEX system and during the latter years of his work on the team, Smalls was on call to respond to any emergency issues that arose with the system. CX 1, 1995 performance evaluation at

"Technical/Functional Knowledge"; 1996 performance evaluation at "Demonstrates a Customer Focus"; HT 262 (Smalls).

Kammer, a degreed fire protection engineer, left the position of lead engineer responsible for implementation of the SIMPLEX system in 1993 when he was promoted to a different engineering position at VCSNPS. HT 358-59, 377-80, 385-88 (Kammer). Alfred Lyons had replaced Kammer as lead engineer by the time Smalls was assigned to the team. HT 402-03 (Kammer), 439 (Lyons). Not long after Smalls began working on the MRF 20951 team, another team member introduced him to Kammer. Smalls immediately confronted Kammer about problems Smalls perceived in the system and questioned Kammer's competence. HT 269-71 (Smalls), 402-03 (Kammer).

Beginning in 1993, Lyons and Smalls had a cooperative working relationship for several years. During that time, Lyons expressed appreciation for Smalls' strengths while recognizing his weaknesses in the area of interpersonal skills. Specifically, Lyons recognized that Smalls had a tendency to become closed-minded regarding how best to address a technical issue and did not give others' views a fair hearing. But Smalls also was "in most instances . . . trying to get to the best solution to an issue." CX 33; *see* HT 440 (Lyons). Another team member, Freddie Joy, was an Instrument and Controls supervisor in Design Engineering who had been involved with the implementation of the SIMPLEX system since the project began. HT 412-13 (Joy). Like Lyons, Joy recognized similar strengths and weaknesses in Smalls' approach to the team project. CX 33; *see* HT 426-29 (Joy). In fact, different supervisors noted weaknesses in Smalls' interpersonal skills on his performance appraisals. CX 1; CX 9, July 8, 1997 Addison memorandum response to non-promotion grievance at 3.

In March 1999, conflicts between Smalls and other SIMPLEX team members began to escalate. CX 2 at 1-2. When Smalls reported one confrontation to Browne, he suggested that Smalls put his specific concerns in writing for review by Design Engineering management. HT 349-50 (Browne). On April 9, 1999, Smalls distributed the first of a series of written communications about problems that he perceived in the design, installation and testing of the SIMPLEX system. CX 12. Smalls' focus went beyond addressing technical issues related to the installation and testing of the system. His approach suggested that he was also concerned "that the guilty parties . . . own up to their mistakes." CX 23, Barton e-mail message dated Mar. 24, 1999; HT 450-54 (Lyons). In April, May and July 1999, Smalls distributed letters to management that harshly criticized early work on the project and advanced serious allegations against co-workers. CX 12/RX 2, 3; RX 17, tabs 1-9. Two letters, dated April 30 and July 6, 1999, used particularly abrasive language to describe Smalls' concerns, including allegations that team members had "lied" regarding installation and testing of system components. CX 12/RX 2, 3.

Although management responded to each of Smalls' technical concerns about the SIMPLEX system, the friction on the team continued. Kammer and others had already advised management of their concerns about the serious accusations Smalls had made, but management delayed addressing their concerns about Smalls' confrontational approach until after the technical issues were fully resolved. HT 115-17, 156 (Stroud), 228-29 (Franchuk); *see* HT 210-13 (Franchuk). On November 1, 1999, Joy joined Lyons in writing a memorandum to Design Engineering management complaining about Smalls' deteriorating role on the team. CX 18/RX 5; *see* CX 2 at 11. Later in November, Nuclear Operations General Manager Bruce Williams and Human Resources specialist Jimmy Duncan met with Smalls and gave him a summary of an independent reviewer's evaluation of Smalls' technical issues. They also advised Smalls that the manner in which he had expressed his concerns was problematic. HT 236-39 (Duncan); CX 2 at 12; *see* RX 17, tab 11.

On December 8, 1999, Barton and Browne met with Smalls to present his performance evaluation with the "below expectations" rating. CX 2 at 13; HT 56 (Barton). In rejecting a grievance that Smalls filed regarding the rating, the Vice-President for Nuclear Operations pointed out that the independent reviewer had not found any willful acts of non-compliance or wrong-doing on the part of employees who had worked on the SIMPLEX project, and he emphasized that "the process [Smalls] chose to communicate his concerns" had damaged his working relationships and was the basis for the unsatisfactory performance rating. CX 2 at 15-16; CX 15/RX 9 at 2; RX 8, 10; HT 236, 239 (Duncan), 340-41 (Browne). On February 14, 2000, Smalls filed this ERA complaint. RX 11. Smalls continued to be employed at VCSNPS until his employment was terminated on December 20, 2000. CX 35.<sup>6</sup>

## **JURISDICTION AND STANDARD OF REVIEW**

The Secretary of Labor has delegated authority to the Administrative Review Board (ARB) to review an ALJ's recommended decision in cases arising under the employee protection provisions of the ERA. *See* 29 C.F.R. § 24.8 (2001); *see also* Secretary's Order No. 1-2002, 67 Fed. Reg. 64, 272 (Oct. 17, 2002) (delegating to the ARB the Secretary's authority to review cases arising under, *inter alia*, the statutes listed at 29 C.F.R. § 24.1(a)).

Under the Administrative Procedure Act, the ARB, as the Secretary's designee, acts with all the powers the Secretary would possess in rendering a decision under the ERA. The ARB engages in *de novo* review of the ALJ's recommended decision. *See* 5 U.S.C.A. § 557(b) (West 1996); 29 C.F.R. § 24.8; *Stone & Webster Eng'g Corp. v. Herman*, 115 F.3d 1568, 1571-72 (11th Cir. 1997); *Berkman v. United States Coast Guard Acad.*, ARB No. 98-056, ALJ Nos. 97-CAA-2, 97-CAA-9, slip op. at 15 (ARB Feb. 29, 2000).

The Board is not bound by an ALJ's findings of fact and conclusions of law in an ERA case because the recommended decision is advisory in nature. *See* Att'y Gen. Manual on the Administrative Procedure Act, Chap. VII, § 8, pp. 83-84 (1947) ("the agency is [not] bound by a [recommended] decision of its subordinate officer; it retains complete

freedom of decision as though it had heard the evidence itself"). *See generally Starrett v. Special Counsel*, 792 F.2d 1246, 1252 (4th Cir. 1986) (under principles of administrative law, agency or board may adopt or reject ALJ's findings and conclusions); *Mattes v. United States Dep't of Agric.*, 721 F.2d 1125, 1128-30 (7th Cir. 1983) (relying on *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 496 (1951) in rejecting argument that higher level administrative official was bound by ALJ's decision). *But see* 29 C.F.R. § 1978.109(c)(3) (expressly providing that an ALJ's findings of fact that are supported by substantial evidence on the record considered as a whole are binding on the Board in whistleblower cases arising under the Surface Transportation Assistance Act, re-codified at 49 U.S.C. § 31105). An ALJ's findings constitute a part of the record, however, and as such are subject to review and receipt of appropriate weight. *Universal Camera Corp.*, 340 U.S. at 492-97; *Pogue v. United States Dep't of Labor*, 940 F.2d 1287, 1289 (9th Cir. 1991); *NLRB v. Stor-Rite Metal Products, Inc.*, 856 F.2d 957, 964 (7th Cir. 1988); *Penasquitos Vill., Inc. v. NLRB*, 565 F.2d 1074, 1076-80 (9th Cir. 1977).

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## ISSUE PRESENTED

Did Smalls establish that SCE&G retaliated against him in violation of the ERA when it evaluated his performance as deficient in December 1999?

## DISCUSSION

### I. The Legal Standard

To prevail in this ERA complaint, Smalls must establish, by a preponderance of the evidence, that he engaged in activity protected by the ERA, that SCE&G knew about that protected activity, took adverse action against him, and that the protected activity was a contributing factor in the decision to take the adverse action. *See Kester v. Carolina Power & Light Co.*, ARB No. 02-007, ALJ No. 00-ERA-31, slip op. at 7-8 (ARB Sept. 30, 2003). If Smalls carries his burden to establish a violation of the ERA employee protection provision through proof of the foregoing elements, SCE&G may avoid liability by establishing, through clear and convincing evidence, that it would have taken the same adverse action in the absence of Smalls' protected activity. 42 U.S.C.A. § 5851(b)(3)(D); *Kester*, slip op. at 5-8 and cases there cited.

The record contains ample evidence, which, if fully credited, could establish three of the four elements necessary for Smalls to carry his burden in this whistleblower complaint – protected activity, the employer's knowledge of protected activity, and adverse action. *See R. D. & O.* at 15-16. Because we dispose of this complaint based on Smalls' failure to establish that protected activity was a contributing factor in SCE&G's decision to rate Smalls' performance "below expectations," we will assume but not decide that when Smalls raised concerns about the design, installation, and testing of the SIMPLEX system, he engaged in protected activity. Furthermore, we assume without finding that this protected activity was known to the decision-makers involved in Smalls'

"below expectations" rating, and that such a rating constitutes adverse action. Specifically, we will limit our analysis to the issue of whether Smalls established that this protected activity contributed to his "below expectations" performance rating for the period ending December 1, 1999.<sup>7</sup>

## II. Analysis

### A. The ALJ's Findings Regarding Discrimination

Unlike the ALJ, we find that the record contains overwhelming evidence that SCE&G rated Smalls "below expectations" in December 1999 because of his abrasive and disruptive conduct. This conduct related to "Teamwork" and "Communications Skills," which were requirements of his job. In concluding that Smalls had carried his burden to establish that protected activity contributed to the performance rating, the ALJ overlooked explicit evidence of management's legitimate reasons for the rating. Indeed, the ALJ analyzed only two pieces of evidence in reaching his conclusion regarding retaliatory intent. Specifically, he relied on a comment contained in the "overall performance" section of the performance appraisal and on the testimony of Human Resources supervisor Jerry Stroud. R. D. & O. at 16.<sup>8</sup>

The December 1999 performance review contains three primary sections. The first is entitled "Performance Measure" and addresses objectives and major work activities, including "[s]upporting the completion of MRF20951 (SIMPLEX) . . . ." The second, "Performance Factors," lists job requirements under six categories, contains a narrative discussion under each category, and provides a rating indicating whether the performance under each category exceeded, met or fell below expectations during the review period. The "Performance Factors" section contains several references to Smalls' performance with the SIMPLEX team and his raising SIMPLEX-related safety concerns. The third section of the performance review, "Overall Performance Level," contains the overall "below expectations" rating and the following comments:

Ardis has obtained a considerable level of knowledge in regard to the intricacies of the SIMPLEX Fire Protection System. He is very dedicated and committed to the installation of a quality product and he displays a very strong conviction in pursuing what he is convinced is the proper course of action. In his zeal to correct certain issues of quality with the project, he has alienated some team members and demonstrated a lack of respect for some individuals by the manner in which he raised the issue. **His actions caused a significant delay in a major project and a large expenditure of resources to close out the issue.** Improvement is needed in written and oral communications, and in interpersonal skills so that no further confrontations occur that require[] escalated organizational response.

CX 1/RX 1 at unnumbered p. 3 (emphasis added).

The ALJ interpreted "His actions caused a significant delay in a major project and a large expenditure of resources to close out the issue," as meaning Smalls' protected activity caused the delay and the large expenditures. Therefore, he reasoned, Smalls' "below expectations" rating was in part based on protected activity. Thus, to the ALJ, the text of the evaluation itself constituted direct evidence of discrimination. R. D. & O. at 16. But the ALJ failed to consider statements in the performance review that clearly praise Smalls for his pursuit of those concerns. He also ignored other statements in the performance review that reveal that SCE&G was concerned with Smalls' unacceptable conduct, not protected activity, when it rated him in December 1999. R. D. & O. at 16; *see* excerpt quoted *supra*.

The statement the ALJ relies upon ("His actions caused . . .") is taken from the summary paragraph in the final section of the performance review, and follows two sentences that are critical to understanding the delay Smalls caused. In the first of these sentences, the supervisor clearly praises Smalls by stating that Smalls "is very dedicated and committed to the installation of a quality product and he displays a strong conviction in pursuing what he is convinced is the proper course of action." CX 1/RX 1 at unnumbered p.3; *see* excerpt *supra*. The next sentence states that Smalls "*alienated* some team members and *demonstrated a lack of respect* for some individuals by *the manner* in which he raised the issue." *Id.* (emphasis added). Thus, the paragraph as a whole indicates that Smalls is being criticized for delaying completion of the SIMPLEX project by the disruptive manner in which he pursued his concerns, rather than being penalized for calling the concerns to management's attention.

Furthermore, statements contained in the Performance Factors section of the performance review provide additional support for this interpretation of the evaluation. Smalls was rated "below expectations" on three of the six Performance Factors listed and "meets expectations" on the other three. Smalls received a "below expectations" rating on the Performance Factor titled "Values Performance." CX 1/RX 1 at unnumbered p.2. Supervisory comments there indicate that, "Ardis demonstrates a strong desire to do what is right and is very open and honest. He has failed on several occasions to consistently treat others with respect and care." To "respect and care" for co-workers is one of the performance requirements listed under that factor.

Similarly, under the "Teamwork" factor, where Smalls was also rated "below expectations," the supervisor states:

Ardis has a good working relationship with most groups and individuals. He supports the common goals, but has exhibited a lack of teamwork and respect for others when he was not satisfied with progress on resolution of certain issues. I believe that Ardis truly felt it was more important to raise the issue to a higher level than whatever the personal consequences would be for raising the issues.

*Id.* Under "Teamwork," the supervisor must rate whether the employee "[a]ccepts, supports, and works with decisions of others; [w]orks cooperatively with team; and [w]orks effectively with other groups/departments." *Id.*

The third factor on which Smalls received a "below expectations" rating was "Communications." Smalls was expected to "[d]iscuss[] issues and concerns in a constructive manner." The supervisor stated:

Ardis openly shares ideas and information. He needs to improve on organizing and conveying information to his audience. When he knows his information will not be readily accepted he should attempt to present it in a non-accusatory tone.

*Id.*

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Although Smalls was rated "Meets" under the "Work Quality" factor, the supervisory comments also reflect concern about the impact of Smalls' disruptive approach to discussing the SIMPLEX issues with other team members:

Ardis strives for an error free work environment. An issue of team trust has developed due to the process Ardis used to raise issues with quality on the project. He has provided constructive input to the recent discussions on implementing and testing the 2.03 software upgrade on the SIMPLEX CGUs.

*Id.*

Similarly, although Smalls was rated "Meets" under the "Internal/External Customer Satisfaction" factor, the supervisor stated:

Ardis has been very supportive of OPS, System Engineering and Design Engineering with regard to certain areas of the 20951 modification. Some customers believe he has been a hindrance to the completion of 20951.

*Id.*

Smalls was also rated "Meets" under the sixth factor, "Planning, Organizing, and Controlling," but the supervisory remarks reflect Smalls' failure to be consistently "constructive" in his approach to interaction with the MRF 20951 team:

Ardis has provided some constructive input to the recent 20951 weekly planning sessions. He provides estimated times for delivering his requested product and meets his deadlines.

*Id.*

The performance review emphasized that, although the technical level of Smalls' work meets expectations and he is committed to quality work, the shortcomings in his interaction with co-workers adversely impacted all aspects of his job performance. In areas where constructive interaction is critical, those shortcomings resulted in unsatisfactory performance. Therefore, when the statement in the summary paragraph about Smalls' "actions" causing delay and expenditures is read in the whole context of the 1999 performance evaluation, it becomes clear that it is the manner in which Smalls addresses safety-related issues that is the subject of management's concern, not the raising of those issues.

## **B. Other Evidence Relevant to Retaliatory Intent**

The performance review itself does not provide details of Smalls' failure "to consistently treat others with respect and care" and his use of an "accusatory tone" to present his views, but other documentary evidence and testimony provide vivid examples of the confrontational and otherwise counter-productive communications style Smalls employed in pursuing his concerns about the SIMPLEX system.

### **1. Barton's testimony regarding the December 1998 and December 1999 performance reviews**

Although Barton was Smalls' first-level supervisor and drafted the December 1999 performance review, he was not a member of the SIMPLEX team, had not played a role in the design, installation and testing of the system, and was thus not the target of Smalls' allegations. HT 93 (Barton); *see* CX 12, RX 2, 3. Barton and Stroud described the SCE&G practice of soliciting input for performance reviews from co-workers with whom the employee regularly interacted and any peers that the employee named. HT 47, 72-73 (Barton), 123-24, 126-27 (Stroud); *see* CX 33. Smalls did not name any peers for Barton to contact for input in 1999. HT 81-82, 86 (Barton). As in 1998, Barton received input in 1999 from others who worked on the SIMPLEX team with Smalls and who had first-hand knowledge of Smalls' confrontational approach and frequent use of abrasive language. HT 83-84 (Barton). In addition to this input from others, Barton had copies of the April, May

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and July 1999 letters that Smalls had submitted to SIMPLEX team members and other management personnel regarding his concerns about the SIMPLEX system. HT 71-79, 93-95 (Barton); *see* CX 12, RX 2, 3. Barton characterized Smalls' "communications style in both written and oral form" as "accusatory and very blunt . . . . He more or less slapped you in the face with it." HT 89-90 (Barton). When Smalls questioned him at the hearing, Barton provided the following explanation of the conflicts Smalls created with other team members:

Design Engineering had a certain set of procedures and documents to go through and you had some issue or you raised some issue as far as whether they were adequate or not. And once you raised it, you – I think you kept pushing the issue, even though it was being researched in the background, so to speak, you still would not go any further until the issue was resolved. I believe that's the best way to describe it.

HT 30 (Barton). As we discuss below, SIMPLEX team members Joy and Lyons testified to their first-hand experiences with specific problems of the type Barton described.

At the time Barton drafted the 1999 performance review, he had received Kammer's May 1999 memorandum that complained about Smalls labeling Kammer a "liar." HT 71 (Barton); *see* CX 17/RX 4. Barton testified that he took Kammer's concerns into consideration but actually focused on his own reading of the Smalls documents. HT 71 (Barton); *see* CX 17/RX 4. Barton did not have a copy of the November 1999 letter from Joy and Lyons complaining about Smalls when he drafted the 1999 performance review, although he was aware of "some friction" among team members and Smalls. HT 83-84 (Barton); *see* CX 18/RX 5.

Barton also testified regarding concerns related to Smalls' teamwork and communications skills that had been raised in 1998 and which were reflected in the December 1998 performance rating. HT 88-89 (Barton); *see* CX 1/RX 7; CX 33. In 1998, Joy provided written input into Smalls' appraisal:

[Smalls is] not open to constructive criticism in job performance. Always on the defensive side. Strives to do the best and right thing in task performance. Needs to improve communication skills.

CX 33; *see* HT 47-51 (Barton), 433-35 (Joy). Lyons also provided input, and much of it was very favorable. CX 33. Nonetheless, in 1998 Lyons also wrote:

Ardis is a positive force in completing "the BLACK HOLE" MRF20951 and its many components. On occasions he may seem a little difficult to work with but after you get to know Ardis as I have over the last 3.5 years you learn that in most instances he is trying to get to the best solution to an issue . . . . The one 3 [score] on "willing to learn and change" is only because I feel this is the only area he needs to improve. Some time he is over zealous in trying to solve a problem and does get narrow[-]minded (don't we all). . . .

CX 33. Lyons' testimony regarding the constant and time-consuming confrontations with Smalls that threatened to halt completion of MRF 20951 in 1999 demonstrates that the weaknesses in Smalls' performance that Lyons noted in 1998 worsened the following year. HT 465-68 (Lyons); *see* discussion *infra* at pt. IIB4.

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Under the "Teamwork" job requirement, the 1998 performance review stated that Smalls had "a good working relationship with most groups, individuals" but also noted that he "does have some conflicts that have yet to be resolved," and "on occasion exhibits some strong opinions/ideas on how to reach the goals and due to his zealous approach to some issues does not accept criticism well." RX 7 at unnumbered p.3; CX 1 at unnumbered p.8. Under the "Communications Skills" requirement, the review stated that, "In his zeal to do what is right, he sometimes may not see the full implications of his suggestions or not clearly present his point." RX 7 at unnumbered p.4; CX 1 at unnumbered p.9. The closing summary of the 1998 review reiterated these concerns:

[Smalls] displays a great conviction in pursuing what he is convinced is the proper course of action and in his zeal he has alienated some individuals/groups. I believe some training would be helpful in the area of negotiation/confrontation so Ardis could learn to better communicate with individuals who may not share his views/opinions.

RX 7 at unnumbered p.5; CX 1 at unnumbered p.10. Barton had hoped that including the statements regarding Smalls' communications and teamwork difficulties in the 1998 performance review would focus Smalls' attention on the need to improve his communications style. HT 88-89 (Barton). However, after Smalls' use of confrontational language continued in 1999, Barton believed that it was necessary to "formally" address the problems to foster improvement in Smalls' communications and interpersonal skills. *Id.* To assist Smalls to improve, Barton appended a list of interpersonal skills courses to the December 1999 performance review. HT 88-90 (Barton); *see* CX 1/RX 1 at unnumbered p.4. In addition, Barton suggested that Smalls submit memoranda addressed to co-workers to Barton first, so that he could "tone down" some of Smalls' language. HT 74-75 (Barton).

Browne, Smalls' second-level supervisor, concurred in the "below expectations" December 1999 performance rating and at the hearing described Smalls as having significant interpersonal skills problems that had interfered with the functioning of the SIMPLEX team. HT 325-29. Browne explained that the performance review stated that some team members had considered Smalls a "hindrance" to completion of the MRF 20951 because conflicts between Smalls and others like Joy and Lyons "essentially brought work on the modification to a halt." HT 337-38. Like Barton, Browne was not present in meetings where confrontations between Smalls and other SIMPLEX team members occurred. HT 344-45, 353-55 (Browne). Also like Barton, however, Browne had reviewed Smalls' April, May and July 1999 letters regarding SIMPLEX. HT 325-30 (Browne); *see* CX 12; RX 2, 3. Browne also had the benefit of management discussions regarding the negative reactions that Smalls' letters had provoked from Design Engineering and other staff that had worked on the SIMPLEX project and who were the subject of Smalls' allegations of lying and records falsification. HT 332-35, 340-41.

Browne asked Smalls to write a memorandum about his concerns regarding the SIMPLEX system in order to get his "ideas clearly down on paper so they could be fairly evaluated." HT 329 (Browne). He made this suggestion after Smalls reported that he and Steven Fipps had a heated exchange about SIMPLEX in March 1999. HT 325, 349-50 (Browne); *see* CX 2 at 1-2. Like Barton, Browne had hoped that Smalls would finally recognize the need to improve his communications style after the December 1999 performance review. Browne believed that Smalls had conducted himself professionally in a December 16, 1999 meeting with Vice-President Gary Taylor and other high level managers to discuss Smalls' internal grievance regarding the December 1999 performance rating. HT 342-43, 352-53 (Browne). Immediately thereafter, Browne visited Smalls at his work-station to commend him for his professional conduct, which Browne viewed as demonstrating improvement. *Id.*

## **2. Smalls' history of communications skills problems prior to 1998**

In addition to the evidence of communications skills problems that were addressed in Smalls' 1998 and 1999 performance reviews, the record contains evidence of management concerns about similar problems dating back to 1992. Stroud, a Human Resources specialist at VCSNPS, testified regarding his experience with Smalls' "longstanding interpersonal skills issues" and Smalls' reliance on accusations and a confrontational tone in his communications with co-workers. HT 109-10.

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Smalls introduced documents pertaining to an internal grievance that he filed in March 1997, in which he alleged that he had been unfairly denied a promotion to the position of Senior Process Analyst.<sup>9</sup> That grievance was the subject of three internal decisions, all of which refer to difficulties with Smalls' interpersonal and communications skills. CX 9. The first of the three internal decisions, which a Human Resources team rendered, states that Smalls has not demonstrated that he should be promoted and concludes:

[I]n the area of interpersonal skills which are very critical in the leadership role of a Senior Process Analyst Mr. Smalls has not demonstrated the skills necessary to be an effective communicator with team members and management. During his tenure he has been involved in confrontational situations which could have been avoided with better decision[-]making on his part. This assessment is further documented on written and verbal items that have been submitted to management and team members by Mr. Smalls.

CX 12 at May 2, 1997 SCANA Human Resources Grievance Investigation Report at 5. Smalls appealed to the next level and alleged that supervisors had defamed him, in part because he was outspoken. Vice-President and Controller Jimmy Addison decided the appeal and stated:

I assume that this is related to the recommendations about your interpersonal skills which are critical for any type of leadership role. I believe that this was truly given as constructive feedback so that you might improve your overall performance and attain the promotion and general performance ratings that you are seeking.

My evaluation is that this is the very heart of the issue in this disagreement between our evaluation of your performance and your perceptions. Teamwork and communications have been repetitive issues in your evaluations since 1992. Those evaluations have been performed by a different individual every year but the same basic issues arise. While these attributes have always been important they are becoming critical to our operating environment as we enter the truly competitive world.

CX 9 at Addison July 8, 1997 memorandum at 3. Smalls then appealed to the company president, John Skolds, who denied the grievance in a ruling dated August 15, 1997. RX 6.

Two of Skolds' conclusions are clearly relevant to the history of the communications and interpersonal skills problems that are involved in this ERA complaint. Regarding Smalls' allegations that SCE&G managers had defamed him and treated him unethically, Skolds concluded that Smalls was relying solely on situations where others had taken "a different position than [his] on a particular topic" as support for those allegations. RX 6 at 3. And in response to Smalls' allegation that he was due a promotion for his work on the SIMPLEX system, Skolds stated:

In some performance areas Mr. Smalls has met or exceeded the requirements for his current role. However, performance evaluations and other documented information have consistently shown Mr. Smalls to have performance difficulty in the areas of interpersonal skills and communications. Mr. Smalls appears to have the potential to be promoted but must work on his communications. Specifically, he should make his communications (oral and written) less con-frontational.

RX 6 at 4; *see* HT 153 (Stroud), 256 (Duncan). We note that Skolds also wrote a final ruling letter rejecting the grievance Smalls filed regarding his December 1999 performance review. That February 14, 2000 ruling letter reiterates the distinction between technical knowledge and interpersonal skills, and the need for Smalls to improve the latter:

[N]o one disputes your technical abilities. However, a significant part of being on a team is working cooperatively. Your communications skills need immediate improvement. It is totally unacceptable for you to continue to communicate in an inflammatory manner.

The management team remains committed to resolving technical matters affecting the safe operation of the plant. Your input is needed and appreciated. You can be a valuable member of the team at V.C. Summer if you change your method of communications to one that is more constructive and less inflammatory.

CX 16/RX 10.

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### **3. Smalls' April 30 and July 6, 1999 letters**

Letters Smalls wrote and distributed to Browne and Design Engineering management provide even more compelling evidence that the December 1999 performance rating was motivated by management's concern about the disruptive effect of Smalls' confrontational approach to SIMPLEX issues. These letters outline Smalls' safety concerns, but they contain harsh criticisms and accusations of "lying" by other SCE&G employees regarding compliance with NRC regulatory standards and company policies. The letters contain statements that management could reasonably object to as being abrasive and counter-productive.<sup>10</sup>

In the April 30, 1999 letter, regarding the verification and validation of the SIMPLEX system, Smalls wrote:

The initial V&V of the SIMPLEX FIRE DETECTION SYSTEM was not performed or done properly by Mr. Mike Kammer (Fire Protection Engineer at the time). From January 25-27 of 1993, Mr. Kammer was to supposedly V&V the SIMPLEX system for operation and functionality. Well, I hate to be the one to bring the bad news, [but] it is no way possible that Mr. Mike Kammer and my [p]redecessor Mr. Rick Smith could have done this. . . .

It was not V&V for the first time until October 20, 1995. At that time, Mr. Albert Lyons, Mr. Freddie Joy, Mr. Barry Mather, and myself were requested to go to Gardner, Massachusetts. At that time, we found a lot of errors that should have and would have been caught, if Mr. Kammer & Mr. Smith had done what was requested of them to do in 1993. . . . I just cannot see how a Fire Protection Engineer (Mr. Kammer) made so many mistakes that were obvious!!!!!! Mr. Kammer should have been held accountable and responsible for such an atrocity but we a[t] VC SUMMER decided to pass the buck consciously or unconsciously. Bottom line, Mr. Kammer and Mr. Smith lied about the initial V&V being done in Gardner, Massachusetts. Or, they did not understand how to implement the process for Validating and Verification. Either one, they should have told management the truth!!

RX 2 at 2-3. In the same letter, Smalls also claims that the MRF 20951 has received inadequate support from Design Engineering and the Fire Protection Coordinator. His statements on this issue include the following:

DE has had a lot of engineers working on this project. The majority of those that work on this MRF 20951 did not pay attention to the NFPA 72 code or made sure that we were applying the code as it applies to VC SUMMER.

RX 2 at 3. Smalls felt that he should be assigned full-time responsibility for the SIMPLEX system as a Computer System Engineer. He states that co-workers assume that he is filling that role, but he expresses his concern that he has not been officially appointed. Thus, he wrote:

For the record, it is the work of Mr. Smalls that this project is trying to reach pay dirt. Mr. Smalls has been flagged with the banner of being confrontational and not having good communicating skills since involvement on this project. Well, Mr. Smalls will defend himself right now. When you have a lot of Senior personnel that are suppose[d] to know and have the answer for systems that they are responsible and accountable for, and you add the fact that these employees may have covered up a grave mistake and thought nobody would unearth the truth, then all of a sudden here comes a young man name[d] Ardis W. Smalls who begins asking some hardcore questions that these folks don't want to answer, I can see confrontations coming. . . . Personally, I don't give a damn about that. I have done my job as a Process Control Analyst . . . . I have took my timeout to train all shifts about the operation of this system but they have not taken it seriously because testing was not required. . . . But I am still not recognize[d] for my work ethics as it pertains to this project!!!! But, I am the man that is keeping this project going in the RIGHT DIRECTION!!!!

RX 2 at 3-4. Additionally, Smalls questioned whether forms used to record post-modification test results were adequate, and, although the engineer who completed the test forms followed the format then in use, Smalls stated that "the I&C job supervisor did not report accurate information relating to the test back to the L[ead] E[ngineer]." RX 2 at 4. Smalls' choice of words suggests that the I&C engineer intentionally misinformed the lead engineer regarding the test results. *See* HT 420-26 (Joy).

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On June 24, 1999, Design Engineering responded to the concerns Smalls had raised in April and May 1999. That response reflected Design Engineering's investigation of each concern and corresponding findings and recommendations. CX 12 at June 24, 1999 memorandum to G. Moffatt, B. Williams, J. Stroud, M. Browne. On July 6, 1999, Smalls

replied in a memorandum to several managers who were associated with the SIMPLEX project. Smalls commented on several of Design Engineering's explanations and recommendations concerning the SIMPLEX issues. RX 3.

Smalls begins by asserting that, "From [1993] until now, I have witnessed DE lie about the true status of MRF 20951." RX 3 at unnumbered p.1. Smalls denies that his reports regarding the SIMPLEX system have been "very accusatory." He states, "I have not accused anybody!! I told who did what based on the facts and what their involvement was and still is in this project." *Id.* Smalls also addressed Design Engineering's directive that, to avoid further miscommunications with the SIMPLEX company, "all future communication to SIMPLEX, both the local and headquarters offices, will come through the R[esponsible] E[ngineer]." Design Engineering had earlier stated that Smalls had "abused" his authority to contact SIMPLEX directly when he telephoned the regional company office to complain about the local representative. RX 3 at 5-6. In his July 6 reply, Smalls attempted to justify his usurping the Responsible Engineer's role vis a vis the SIMPLEX company:

For the record, I did not abuse my authority . . . . There were several discussions about problems with the local office. DE Responsible Engineer (Albert Lyons) complained a lot about not receiving the proper responses from the SIMPLEX local office. I told him to get his Supervisor or Manager to generate a letter to Mr. Turay and the problem will get resolved. For some reason, Mr. Lyons did not want to confront his chain of command[.] Therefore, tired of his complaining, I took the appropriate action as Mr. Turay told me directly [in] Mass[.] in October of 1996. Therefore, as [a] member of VC Summer Nuclear Station Team, I took the proper action.

RX 3 at 6.

When Design Engineering responded to Smalls' safety concerns on June 24, it had explained that the failure to install alarm bells in a maintenance building was the result of a "communication break-down." *Id.*; see RX 3 at 13-14 (further comments from both sides regarding when maintenance building was built). But Smalls disagreed:

This was not an oversight or breakdown. This is an example of not following the programs that were established for VC Summer Nuclear Station. During the initial installation of hardware, these items should have been verified for existence and not assume[d] to exist. Plant Program violated. . . .

RX 3 at 6.

The closing summary of Smalls' July 6 comments include the following statements:

I hereby charge DE with failure to accurately report and to be truthful in the preparation, review or submission of reports that are held as plant records. . . .

For the record, Mr. Kammer lied to Mr. Browne who was manager at the time and he lied to our Vice-President who had to agree to the purchase of this mod. And most of all, he lied to his fellow employees who trusted that he would do the proper V&V. . . .

RX 3 at 21. At the hearing, Smalls repeatedly reiterated his assertion that Kammer had "lied" regarding the validation and verification of the SIMPLEX system. HT 269-71, 291-96 (Smalls).

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#### **4. Written complaints about Smalls' conduct from Kammer, Lyons and Joy**

Several witnesses testified concerning the counter-productive effect that language used in Smalls' letters had on them individually and also on the functioning of the SIMPLEX team. Beyond the abrasive language used in the letters, the record contains testimony concerning Smalls' disruptive conduct that caused delays in the team's completion of MRF 20951. Not surprisingly, Kammer, Joy and Lyons filed written complaints with management in 1999 regarding their concerns. CX 17/RX 4; CX 18/RX 5.

Kammer sent a memorandum to Barton in May 1999 after learning of Smalls' April 1999 allegations that Kammer had lied about the "verification and validation" (V&V) testing process. HT 371-73 (Kammer); *see* RX 2 at 3. Although Kammer was no longer on the SIMPLEX team, he was the fire protection engineer who had initially designed the system for the VCSNPS lay-out. As a licensed professional engineer who still worked in the Design Engineering division, he took "strong personal and professional exception to Mr. Smalls['] allegations of hiding information developed for this project, or not being forthcoming to management concerning the project status." CX 17/RX 4. In his May 1999 memo to Barton, Kammer states that he has recommended that management undertake an independent technical review of Smalls' claims about the design, installation and testing of the SIMPLEX system, in addition to a technical review that Design Engineering was then handling. *Id.* Kammer also states:

My response and the independent review will prove these claims and allegations are without merit. It has been my experience that a questioning attitude is healthy for any team; however, Mr. Smalls['] claims go beyond questioning and border on defamation. His methods in this case are also unprofessional. Please consider this as input into his upcoming Performance Evaluation for 1999.

CX 17/RX 4; *see* HT 406-07 (Kammer).

Similarly, Lyons and Joy sent a November 1999 memorandum to Fipps, head of Design Engineering. CX 18/RX 5. They stated that Smalls' actions and statements beginning in February 1999 had compromised the "internal trust" among SIMPLEX team members. This demonstrated "that he is no longer willing to function as a supportive Team member for MRF 20951." CX 18/RX 5. The memorandum described the delays Smalls was causing:

A change in his ability to compromise and be objective on issues, even if all other Team members have reached a consensus, has not been well received. There have been cases where he has provided no supporting evidence to proceed in a different direction on a given issue, but that is the way he wants it done. He has also made statements indicating that malicious compliance will be the path of travel in updating or correcting software, in times when his input and feed back is needed.

No one on this Team is *perfect* or always 100% correct. This is why we practice the "STAR" principles and have successfully worked as a Team in supporting each other's work. Mr. Smalls over the past 5 months has raised a number of concerns and issues that have been previously addressed or has no proven foundation or basis. Our observations indicate that he is unwilling to accept the answers to the issues that are contrary to his beliefs and has maintained a one-man crusade during this time period. His recent performance and allegations in this area has cost this job numerous man-hours of Engineering time, and 4 months of productive work. His continued vigilance in bringing planned work to a halt (most recently loading the software on the simulator) indicates that he has moved away from being an objective team player to support the closeout of MRF 20951 by December 31, 1999. Another problem is his reluctance to work with the assigned Simplex Technical Representative and his continuing effort to circumvent the Local Simplex Office on Technical issues.

CX 18/RX 5. The memorandum concludes by asking that Smalls be replaced with a different computer support representative to serve as the primary contact for the SIMPLEX team, although Lyons and Joy stated that they would not object to Smalls playing a back-up computer support role. *Id.*

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Lyons, who was the lead engineer on the SIMPLEX project beginning in 1995, testified that he and Joy sent the memorandum to their Design Engineering supervisors and the general manager only after months of deliberation. HT 465-66. They did not want Smalls disciplined, but they thought that someone else, possibly Smalls' supervisor, needed to "act as an intermediary" so that when confrontations arose, they "could go to the

supervisor and the supervisor would remedy the problem." *Id.* Lyons described Smalls' disruptive conduct in those months as follows:

We just had trouble dealing with him on issues. We felt like if he had his idea of doing it, even if it was almost what he wanted to do, if it wasn't the same way he wanted it, we had confrontations.

HT 465-66. Similarly, when Smalls questioned him regarding when he and Smalls began to have difficulties working together, Joy replied:

Later on, it seemed that you had – my personal observation, it seemed that you had an alternative agenda, other than performing the actual functions that you were designated to perform in that particular modification. And it just seemed that you had your own agenda where you were not focused totally on the performance of this modification in the way that you had been before.

HT 427.<sup>11</sup>

Lyons also said that the "constant confrontations" with Smalls would require "two and three hours trying to discuss an issue, trying to keep peace among the program." HT 467. They were working on a timetable and could not invest "three and four hours a day trying to resolve small issues." *Id.* Lyons and Joy both testified regarding instances in which Smalls would insist on hours of discussion regarding an issue, attempting to convince the engineers on the team that his view was correct. Then an authoritative source – SIMPLEX headquarters, for example – would confirm that Smalls' technical view was not correct. HT 416-19, 429-31 (Joy), 468 (Lyons). Smalls was also quick to blame others, even if it ultimately was shown that they had not made a mistake in executing their work on the system. Furthermore, Smalls typically refused to acknowledge when he was proved wrong. HT 450-54 (Lyons).

##### **5. Management's response to Smalls' technical concerns about SIMPLEX and his July 1999 allegation of intimidation**

Timothy Franchuk and other representatives from the Employee Concerns Program (ECP) had spoken with Smalls in April and May about whether he wanted them to investigate his technical concerns. He told them that he did not. HT 191-93 (Franchuk); RX 17, tabs 1-2. In Smalls' July 6, 1999 letter, in which he offered rebuttal of Design Engineering's assessment of his SIMPLEX concerns, he also alleged that others had tried to intimidate him "into stating that this MRF is ready to be signed off." RX 3 at 21; RX 17, tab 9 at 21. In view of Smalls' allegation regarding intimidation, Franchuk and Dave Levine, the general manager for Nuclear Support Services, agreed to initiate an ECP investigation into both Smalls' technical concerns and the intimidation allegation. HT 193-198 (Franchuk); RX 17, tab 10. At that time, Franchuk and other managers met with the NRC Resident Inspector at VCSNPS, who agreed that an ECP investigation was appropriate. HT 198-200 (Franchuk). Franchuk and other managers decided that Design

Engineering would conduct an operability review of the SIMPLEX system and that an outside consultant would also be engaged to conduct a review of Smalls' technical concerns. HT 200-01 (Franchuk); RX 17 at timeline.

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Concerning Smalls' intimidation claim, the ECP investigation found that Smalls' only basis for that allegation was that Design Engineering had distributed a copy of its June 24, 1999 response to Smalls' technical concerns to Stroud, in the Human Resources office. RX 17, tab 10; tab 11 at Executive Summary; HT 222-24 (Franchuk). ECP concluded that the "tone and content" of Smalls' April and May 1999 correspondence warranted Design Engineering's contacting Human Resources. RX 17, tab 11 at Executive Summary. ECP ultimately concluded that Smalls had not substantiated his intimidation allegation and that "communications and project management" of the MRF 20951 had contributed to Smalls' perception. *Id.*; HT 229 (Franchuk).

Franchuk testified that he initially found Smalls' explanation of his technical concerns difficult to follow and that Franchuk's role was to act as Smalls' "agent" by ensuring that the concerns were fully investigated and resolved. HT 200, 222-24 (Franchuk). The issue of whether Smalls had used abrasive language or exhibited poor interpersonal skills in raising his technical concerns was not within the scope of the ECP investigation. HT 228-29 (Franchuk); *see* RX 17, tab 11 at Executive Summary.

Following an on-site investigation, in which he spoke with thirteen VCSNPS employees including Smalls, the independent, outside consultant evaluated Smalls' technical concerns. RX 17, tab 11 at Evaluation Notes. The consultant, William Miller, was a retired NRC inspector with more than thirty-six years of experience with designing and evaluating fire detection, suppression and fire barrier systems. RX 17, tab 11 at Miller resume.

Miller's report finds some of the issues Smalls raised were unsubstantiated, that corrective action was already pending to address other issues, and that at least one issue reflected a misunderstanding of "pressure switches on the various automatic sprinkler systems." RX 17, tab 11 at Evaluation Notes at 2, 4-7. Miller also agreed with Design Engineering's plan to enhance post-modification test sheet formats with changes that Smalls initially recommended. *Id.* at 3; *see* HT 448-50 (Lyons). Miller also recommended that "qualifications for the personnel performing computer related work activities on the SIMPLEX Fire Protection System be established." RX 17, tab 11 at 8.

Smalls contends that Miller was not qualified to review the technical issues. HT 285-86 (Smalls); Comp. Brief at 18-19. In fact, according to Smalls, based on his knowledge of computerized systems and his training regarding the SIMPLEX system, he was the only person who was adequately qualified to assess the technical issues he had raised. HT 284-87. However, Franchuk testified that NRC representatives had not objected to management's choice of Miller to conduct the investigation. HT 203-07, 225-26.

Franchuk also pointed out that Miller, as a retired NRC inspector, had experience in asking the right questions in the course of an investigation, in order to ensure that he had an adequate understanding of the technical issues, even if he did not have experience with SIMPLEX computer software. HT 200-01, 205-06 (Franchuk).

## **6. The NRC investigations and Smalls' objections to the NRC inspector**

On May 1, 2000, the NRC issued a report of an inspection of VCSNPS that it conducted between February 27 and April 1, 2000. RX 18. The inspection covered both the five-week period of resident inspection and also the results of an announced inspection by a Regional Reactor Inspector in the area of fire protection. RX 18 at Executive Summary. The May 1 report specifically addressed the post-modification test requirements of the SIMPLEX fire detection and alarm system and found that those were adequate and that they met appropriate testing requirements. *Id.* at unnumbered p.2, Enclosure at 9-11, Section F3.1. In addition to conducting his own inspection of samples of post-modification and periodic testing of the SIMPLEX system, the NRC inspector reviewed Miller's July 1999 report and agreed with Miller's conclusions. *Id.* at 10.<sup>12</sup>

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In a May 7, 2001 letter, the NRC addressed questions that were presented in a January 7, 2001 letter from Smalls. JX 1. The May 2001 letter rejects Smalls' concern about a lack of testing of supervisory circuits in the SIMPLEX system because NRC regulations did not require such testing and because the lack of testing did not undermine the functioning of the system as intended. An attachment to the letter also explains why it would be unreasonable to conclude that SCE&G personnel had falsified records about such testing. JX 1 at Enclosure at 2. More relevant to our analysis, the NRC letter addresses Smalls' objections to the qualifications of the Regional Reactor Inspector who had conducted the inspection of the VCSNPS fire protection system.

The letter states that the NRC inspector was "a qualified and experienced fire protection engineer." The NRC states that it nonetheless instructed a second NRC inspector to review the efforts of the first inspector. The second inspector

concluded that while our assigned fire protection engineer did not have expertise in SIMPLEX fire detection computer hardware and software, he did have sufficient expertise to understand the required functions of the system, the testing and inspections performed to verify those functions, the applicable code requirements, and the NRC requirements.

JX 1. Nevertheless, Smalls testified that he believed that the NRC inspector's qualifications were, like those of Miller, inferior to Smalls' own. HT 284-87.

## **C. Summary of the Evidence**

The overwhelming weight of the evidence supports management's December 1999 assessment that Smalls' communications and teamwork skills were unsatisfactory. The record also establishes that Smalls' pursuit of ERA-protected safety-related issues did not contribute to the "below expectations" rating. Documentary evidence and testimony by SIMPLEX team members and Smalls himself bolsters the testimony of Barton and Browne, who, respectively, drafted and approved the performance appraisal. As Barton testified, Smalls' performance standards required that he "work with the [SIMPLEX] team in a productive manner." HT 83-84. The company president had counseled Smalls in 1997 regarding the importance of improving his interpersonal skills by making his communications less confrontational. Barton had attempted to assist Smalls in "toning down" the abrasive language he typically used. Smalls' letters and his hearing testimony clearly demonstrate harsh criticism and imprudent accusations. Members of the SIMPLEX team provided first-hand testimony of how Smalls disrupted work on the MRF 20951, despite their efforts to address his technical concerns.

And although management remained "committed to resolving technical matters" affecting plant safety, and assured Smalls that it "needed and appreciated" his input, the company president's grievance ruling pertaining to the December 1999 evaluation reflects management's awareness of Smalls' history of abrasive conduct. President Skolds emphasized the need for Smalls to change his "method of communications to one that is more constructive and less inflammatory." RX 10. Moreover, management investigated and addressed Smalls' technical concerns to the full satisfaction of the NRC. In sum, the evidence establishes that the "below expectations" rating was directed toward well-documented deficiencies in communications and teamwork skills and not toward the raising and pursuit of nuclear safety-related issues.<sup>13</sup>

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### **CONCLUSION and ORDER**

Since Smalls failed to demonstrate that SCE&G rated him "below expectations" because he raised nuclear safety concerns, he did not prove that SCE&G violated the ERA. Therefore, we **DENY** his complaint.

**SO ORDERED.**

**OLIVER M. TRANSUE**  
**Administrative Appeals Judge**

**M. CYNTHIA DOUGLASS**  
**Administrative Appeals Judge**

### **[ENDNOTES]**

<sup>1</sup> The statute provides, in pertinent part, that "[n]o employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms,

conditions, or privileges of employment because the employee" notified a covered employer about an alleged violation of the ERA or the Atomic Energy Act (AEA) (42 U.S.C. § 2011 *et seq.* (2000)), refused to engage in a practice made unlawful by the ERA or the AEA, testified regarding provisions or proposed provisions of the ERA or AEA, or commenced, caused to be commenced or is about to commence or cause to be commenced, or testified, assisted or participated in a proceeding under the ERA or AEA to carry out the purposes of this chapter or the AEA as amended. 42 U.S.C.A. § 5851(a)(1).

<sup>2</sup> At the close of the first day of the two-day hearing, the ALJ announced that he owned stock in SCE&G's parent company, SCANA Corp. The ALJ explained that he had been unaware of the corporate relationship between SCE&G and SCANA until earlier in the day, when he admitted into evidence a document carrying the SCANA logo. Hearing Transcript 318. The parties stated that they did not have any objection to the ALJ continuing to preside over the hearing and deciding the case. *Id.* Administrative Review Board review of the case record revealed the foregoing exchange, but the record contained no further indication regarding the value of the stock or other information that would be relevant to the ethics regulations at 5 C.F.R. Part 2635, including the 18 U.S.C. § 208 disqualifying financial interest provision that is implemented at Part 2635 and Part 2640. Following inquiries on behalf of the Board by the ARB General Counsel, the ALJ notified the Board that he had consulted with the Designated Agency Ethics Official in May 2001, who had advised that the circumstances did not require the ALJ's recusal from this case. ARB Gen. Coun. ltr. to ALJ dated Nov. 18, 2003; ALJ ltr. to Gen. Coun. dated Nov. 20, 2003, with June 1, 2001 e-mail msg. from Designated Agency Ethics Official attached; *see* 5 C.F.R. § 2635.107(b) (2001). The parties were served copies of both the General Counsel's and the ALJ's letters and neither party has raised any objection. It is thus unnecessary for us to address this issue further.

<sup>3</sup> We will use the following abbreviations to refer to the case record: Hearing transcript, HT; Joint exhibit, JX; Complainant's exhibit, CX; Respondent's exhibit, RX.

<sup>4</sup> This case involves very few disputed facts and our disposition turns on the legal significance of the facts that the record clearly establishes. The ALJ questioned the credibility of only one witness. He discredited portions of the testimony of Human Resources supervisor Jerry Stroud regarding the reasons the company terminated Smalls in December 2000. The ALJ discredited the portion of Stroud's testimony that SCE&G adduced because he found it to be an attempt to recant Stroud's earlier testimony, which had been given in response to questioning by Smalls. R. D. & O. at 16. Smalls represented himself at hearing and thus personally questioned his former co-workers regarding the deteriorating relationship with him on the SIMPLEX team in 1999. The credibility of the testimony given by those co-workers – Joy and Lyons – is enhanced by the fact that they responded with very straightforward, non-evasive answers to questions about Smalls' disruptive conduct when questioned by Smalls himself. *See* discussion *infra* at pt. IIB4.

<sup>5</sup> Smalls actually held four different positions in the computer field over the years he worked at VCSNPS: Technical Specialist II, 1990-91; Computer Specialist II, 1992; Systems Programmer Analyst, 1993; Process Control Analyst, 1993-2000. CX 9, Mar. 5, 1997 grievance statement at 2.

<sup>6</sup> The parties stipulated that the termination action was not at issue in this case, although Smalls was allowed to introduce documents and adduce testimony regarding the events that transpired during his last year at SCE&G. HT 7; *see* R. D. & O. at 2.

<sup>7</sup> It is thus unnecessary for us to determine whether Smalls was acting on a reasonable, good faith belief that a nuclear safety-related standard was being violated when he raised each concern about the SIMPLEX system. Nonetheless, SCE&G's contention that Smalls' concerns were confined to fire safety and did not relate to nuclear safety, SCE&G Brief at 19-20, warrants comment. As the ALJ found, concerns related to nuclear power plant fire safety clearly fall under the category of safety concerns protected by the ERA. *See, e.g., Stone & Webster Eng'g Corp. v. Herman*, 115 F.3d 1568 (11th Cir. 1997).

<sup>8</sup> The ALJ characterized Stroud's testimony as direct evidence of discriminatory intent. However, this testimony pertained to Smalls' termination in December 2000, not his unfavorable personnel evaluation in December 1999. Therefore, we find that Stroud's testimony regarding the reasons for the December 2000 termination is not very relevant to SCE&G's motivation in rating Smalls "below expectations" in December, 1999. We discuss Stroud's testimony concerning Smalls' history of interpersonal skills issues *infra*, at pt. IIB2.

<sup>9</sup> The March 1997 grievance alleged race-based discrimination and cronyism but did not allege discrimination based on ERA-protected activity. CX 12.

<sup>10</sup> Furthermore, the record provides no basis for concluding that Smalls was justifiably provoked to use such language, either by an unreasonable response to his technical concerns or because the hazards that he perceived posed an immediate danger at the power plant. *See* n.13, *infra*.

<sup>11</sup> As noted under pt. IIB3 *supra*, Smalls complained that management had failed to formally appoint him to the position of Computer System Engineer with full-time responsibility for the SIMPLEX computer system. RX 2 at 3-4, 9; RX 3 at 16; *see* HT 74-79 (Barton).

<sup>12</sup> The NRC inspection did find one violation of NRC requirements, but it was not related to the fire protection system at the plant. RX 18. The "non-cited violation" concerned "an inadequate surveillance procedure used to verify that the emergency core cooling discharge piping is full of water." *Id.* at Executive Summary.

<sup>13</sup> The employee provocation doctrine does not apply to excuse Smalls' objectionable conduct. Smalls did not engage in impulsive, uncalculated behavior but instead deliberately and unnecessarily relied on abrasive language and a confrontational

approach. *See Harrison v. Roadway Express, Inc.*, ARB No. 00-048, ALJ No. 99-STA-37, slip op. at 9-15 and cases there cited (ARB Dec. 31, 2002).